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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JAMES MCNUTT,

Defendant and Appellant.

A157472

(Sonoma County Super. Ct.
No. PRL2011931)

Robert James McNutt appeals from the trial court's order revoking his parole. He contends substantial evidence did not support the courts finding that he violated his parole by committing a lewd act on his stepdaughter in violation of Penal Code section 288, subdivision (a).¹ For the reasons discussed in this opinion, we shall reverse the order revoking appellant's parole.

PROCEDURAL BACKGROUND

Appellant was released on lifetime parole in 2016, after serving approximately 17 years in prison for a second degree murder he committed in 1990.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On October 3, 2017, appellant was charged by felony complaint with four counts of committing a lewd act upon the body of a child, in violation of section 288, subdivision (a), on or between August 1 and September 27, 2017. In a subsequent information, which the court read at the start of appellant's March 2019 trial, it was alleged that on or between September 1 and September 27, 2017, appellant committed a lewd act upon a child pursuant to section 288, subdivision (a) by engaging in the following specific touching: "hand to breast" in count 1; "kissing on the mouth" in counts 2 and 3; and "hand on the waistband" in count 4.

On October 4, 2017, the Sonoma County District Attorney filed a petition to revoke appellant's parole for the same conduct that had resulted in the criminal charges, based on a violation of the parole condition that appellant obey all laws. The parole revocation matter was to trail the criminal case.

On March 11, 2019, at the conclusion of a jury trial in the criminal case, the jury found appellant not guilty of count 1 ("hand to breast") and count 4 ("hand on the waistband"), as well as not guilty of the lesser included offenses of attempted lewd act upon a child as to those counts. The jury was unable to reach a verdict on counts 2 and 3 ("kissing on the mouth"). The trial court ultimately dismissed counts 2 and 3 at the request of the prosecutor.²

² During the subsequent parole proceedings, the court noted that, as to counts 2 and 3, five jurors "thought there was sufficient evidence for beyond a reasonable doubt proof [*sic*], and the other [seven] found that there was not." The prosecutor responded that none of the jurors found witness "Teresa P.'s testimony sufficient to rely on to convict on any of the counts" and that "[t]he five that voted for guilty on the two counts related to the kissing thought that [Tiffany R.'s] testimony was

On March 21, 2019, following the resolution of the criminal case, the trial court conducted a contested parole violation hearing, at which appellant's parole officer testified. The trial court also relied on the evidence presented during the criminal trial to determine whether appellant had violated his parole. On April 11, following arguments of counsel, the court found that appellant's conduct with the victim, "Jane Doe" (Jane), when she was 11 years old "was done to—probably for multiple purposes, but it was done to gratify her and placate her, I would imagine, but gratify her and certainly she's under the age of 14." The court therefore found appellant in violation of his parole.

On April 11, 2019, the court issued a written order after hearing, in which it first discussed some of the witness testimony presented at trial. After analyzing that testimony, the court found, by a preponderance of the evidence, that appellant had violated section 288, subdivision (a), and had therefore violated his parole.

The court then remanded appellant to the Department of Corrections and Rehabilitation, pursuant to section 3000.08, subdivision (h).

On June 7, 2019, appellant filed a notice of appeal.

FACTUAL BACKGROUND

At the contested parole revocation hearing, parole agent Nicholas Austin testified that he began supervising appellant in February 2017, after appellant had already been on parole for a period of time. Appellant's conditions of parole included a standard condition that he obey all laws.

more persuasive. The . . . seven who voted not guilty did not believe that, despite [Tiffany's] testimony, . . . it was sufficient to find proof beyond a reasonable doubt."

The court also considered the following testimony, which had been presented at the earlier criminal trial on the four counts alleging violations of section 288, subdivision (a).

Prosecution Case

Jane's mother testified that she and appellant married in November 2016, which was when he moved into her home. Her two sons and Jane also lived with them. Jane was diagnosed with autism before she was two years old.

In the mornings, Jane's mother would help Jane dress and get ready for school, and appellant would take her to the bus stop to wait for the bus. Someone had to be with Jane at all times and hold onto her because she was "a flight risk, meaning that if you let go of her, she will gallop away from you." She had run out into traffic a few times.

On cross-examination, Jane's mother testified that Jane's responses to questions were generally less than three words, and she would often repeat phrases that she had heard in a television show or that other people had said. She also engaged in tantrums and self-injurious behavior, such as biting her hand or banging her head on the table, when she did not get her way. Jane had a history of preferring to be naked and, when she was out in public, would lift up her shirt or put her hands in her pants.

In 2015, about a year and a half before appellant starting living with them, Jane started watching pornography. When Jane's mother took the Internet away from her, Jane smashed her head on the table and her mother sought additional services. The family then began to meet with a therapist, who helped set goals for Jane. Once appellant

moved in, he also participated in the therapy, together with Jane's mother and her oldest son, learning how to communicate with Jane and help her with daily activities.

Jane was always very affectionate, including when appellant lived with them. She would jump on family members' laps and ask for tickle time. She would ask appellant for the "chipmunk" game, where she would jump on his lap and "he would do a little chipmunk thing on her neck and make her giggle and laugh, and then she would spring up and gallop away and then come back and jump back on his lap again." When Jane was upset, her mother would do deep breathing, massage her shoulders, rub her lower back, play music, or tickle her. Jane also liked to be hugged and the family would give her bear hugs, which they called "squishy hugs," holding her really tight, and sometimes picking her up off the ground. Jane's mother would hug her from the front; appellant would hug her from either in front of or behind her. Jane craved the squeezing, as do a lot of autistic children.

Jane also liked to kiss, and "she just kissed way too long and you have to turn away, turn her away, turn yourself away from her." This became a problem from the time she started watching pornography in 2015. Appellant was aware of that issue. During the time appellant lived with them, Jane's mother never observed anything she thought was inappropriate take place between appellant and Jane.

Jane started her period sometime prior to the summer of 2016, before appellant moved in with them. Jane's mother took Jane for a physical examination related to this case on October 3, 2017.

Amy Fuller, a behavior analyst who worked with individuals with developmental disabilities, testified that she provided services to Jane

for about two years. Fuller would come to Jane's apartment once or twice a week for about an hour. She would observe the technician working in the home with Jane and do parent training. She also would observe Jane's behaviors, and was familiar with her mother, her brothers, and appellant.

Fuller had observed appellant with Jane, and on two occasions saw something that caused her concern. Jane would lie down on top of appellant, who was sitting on the living room couch, in a "belly flop" and "kind of like a hugging behavior." This concerned her because appellant was the stepdad and he had not been in the home for very long. Fuller also saw that appellant often was not wearing a shirt when she visited the home, which "was just bizarre for [Fuller]" because she had not been in many homes where the parents were not wearing a shirt. The two times Jane lay on appellant, however, she believed appellant was wearing a shirt.

Fuller saw that Jane struggled in general with personal space issues in that she "is very affectionate, likes to hug people that she does not know." Jane would try to hug Fuller, who redirected her to engage in "high fives" instead. Jane never tried to kiss Fuller.

On cross-examination, Fuller testified that some of the issues she was asked to address when she started working with Jane included, among other things, self-care, tantrums, identifying emotions, following social rules, and running away and not following directions to come back. These issues needed to be addressed because of Jane's autism and apparent developmental delays. When appellant moved into the home, he also became involved in the training Fuller had been providing to Jane's mother.

For her safety, Jane needed constant adult supervision. Throughout the entire time Fuller worked with the family, including after appellant came into the home, Jane “made really good progress.”

Fuller never told appellant or Jane’s mother that she did not think it was appropriate for Jane to lie down on top of appellant. Both Fuller and the technician who was in the home five days a week were mandated to report to law enforcement anything they saw that led them to believe a child was being harmed. Fuller did not feel the need to report this behavior to law enforcement because she “knew Jane[’s] background of her being really affectionate.”

Valerie Malvesti, a special needs teacher, testified that she was Jane’s classroom teacher for the 2017-2018 school year. As a rule, autistic children need to be taught to socialize, and Jane preferred to be alone “because she lived in a sort of a cartoon world.” Jane could not carry on a conversation, and for her to understand what was being said, it was necessary to use just a few words when talking to her. Jane used only single words when talking, but was able to better understand written words and to respond in writing. She also used drawings to communicate. Jane could read at a fourth grade level at least.

Malvesti never saw Jane having issues with personal space, such as hugging or kissing anyone in her class. Nor did Malvesti ever have to hold her hand when walking her and other students from the bus to the classroom in the mornings. Most of the children, including Jane, loved coming to school, so they would lead Malvesti to the classroom.

Jane had always been a docile child in the classroom. She liked to make gentle noises or would sometimes whine. At one point, Malvesti started noticing a change in the sounds Jane made. She did a

lot of screaming, did not listen, and acted much more frenzied. Several times, she used a sensory ball in the classroom to go up and down and masturbate while saying, “ ‘Fuck, fuck, fuck. Sexy, sexy, sexy.’ ” Malvesti first observed this new behavior in the first week of October; it lasted about three weeks. The behavior then ended and Jane went back to behaving appropriately in the classroom.

In late October, before Halloween, Malvesti became aware that Jane had been removed from her home when she was told not to put Jane on the bus at the end of the day.

On cross-examination, Malvesti testified that Jane was autistic and also had some level of intellectual delays. Jane liked using the computer in the classroom and, “amazingly,” was able to do Internet searches on her own. Jane was echolalic, which meant she commonly repeated phrases that she heard on a television show or that someone else had said.

Jane began menstruating sometime towards the end of the school year. Malvesti was unaware of Jane putting her hands in her pants in previous school years, but it would not surprise her.

Tiffany R., who lived in the same apartment complex as Jane and her family, testified that one morning in September 2017, while she was walking to her car between 6:40 and 7:00 a.m., she saw a man she did not know standing with Jane at the edge of a parking lot in front of the apartment complex. They were waiting for the bus that would take Jane to school. Tiffany had previously seen the man occasionally walking with Jane and Jane’s mother. At trial, Tiffany identified appellant as the man she saw that morning with Jane.

Tiffany's attention was drawn to appellant and Jane when she saw them from about 20 feet away as she came down the stairs from her apartment. She noticed that they were standing, facing each other, with appellant "pressing himself into her and rubbing her shoulders." It reminded her of the way a boyfriend and girlfriend would hug. Tiffany also saw appellant kiss Jane on the mouth. She did not see any "tongue," but it lasted a few seconds and was "more of a passionate kiss than you would give your children." As she walked by them on the way to her car, she noticed that appellant saw that there were people coming and he changed his position, standing behind Jane with his hands on her shoulders. Tiffany believed that if it had been "just an innocent embrace," there would be no need to change position when people walked by. Tiffany did not initially report what she had seen to law enforcement because she wanted to observe appellant and Jane again and make sure she was not wrong about what she had seen.

A few days after the first incident, between 6:30 and 7:00 a.m., Tiffany saw appellant and Jane in the same location, waiting for the bus and engaging in the "same type of embrace and rubbing her shoulders, and that intent kind of kissing on the mouth. No tongue. But intent kissing on the mouth." As Tiffany passed them, appellant again stopped what he was doing and positioned himself behind Jane.

A few days later, Tiffany saw the same thing happen at the same location: appellant embracing Jane with his pelvis pressed into her. After this third occasion, Tiffany told Jane's therapist about what she had seen, and she believed it was the therapist who contacted law enforcement. Tiffany waited until after the third time she saw the behavior to tell the therapist because she did not want to accuse anyone

of doing anything that may not have been the truth. But after repeatedly seeing the same thing, she decided to tell the therapist the next time she saw her.

On cross-examination, Tiffany testified that the place she saw appellant and Jane standing while waiting for the bus was next to the apartment manager's office and a workout area near the main entrance to the apartment complex and adjacent to a parking lot, mailboxes, and three-story apartment buildings positioned on either side. The location was also visible from a nearby street leading into the apartment complex. When Tiffany went to her car every morning, there were other people also leaving for work or school from that side of the apartment complex.

Tiffany only saw appellant's hands on Jane's shoulders, never around her back or waist. Nor did she see appellant moving Jane from side to side. The only other people she saw nearby on the three mornings she saw appellant and Jane were teenagers getting ready for school or going to their cars. Tiffany also acknowledged that her daughter had previously been a victim of sexual assault.

Cruz M., who also lived in the same apartment complex as appellant and Jane, testified that in September 2017, he always walked from his apartment just above the complex's office to his car around 7:00 a.m. One day, when he came down the stairs near the mailboxes, in an area where kids always wait for the bus, he noticed a girl he did not remember seeing before making animal noises like a monkey. She appeared to be between 12 and 15 years old. He saw her with a man he also had never seen before. After that, he saw the man and girl outside waiting for the bus about five times as he walked by. Sometimes the

girl was quiet and sometimes she would be making noise. Cruz identified appellant as the man he saw with the girl.

On one occasion, Cruz saw appellant holding the girl from the back, with his hands folded in front of her stomach. On another occasion, the girl may have been “turned around,” and Cruz saw the man lean over and kiss her on the forehead.

Cruz had previously spoken to a detective about the case. After reviewing a police report the prosecutor handed to him, Cruz testified that the detective “kept on asking me over and over again about where his hands were, and I never said that it was on her butt, not one time that I remember.” Nor did he recall saying he saw a male “squeezing this girl by the butt.” He could not remember if he told a detective that he saw the man kissing the girl’s forehead “a lot and kissing the girl’s lips.” He never told a detective that the man’s arms were around the girl’s breasts.

Cruz acknowledged that he did not like having to miss work to testify at trial after he had already given his statement to police. He also acknowledged that he might have told the people in the apartment complex’s office that he “saw this guy out front hugging this girl while she is making noises.” He had mentioned this because “everybody in the complex was talking about it.”

On cross-examination, Cruz testified that the way he saw appellant kiss the girl was how he would kiss his own child. He sometimes drove past appellant and the girl as he left the parking lot for work because they were standing right next to a driveway pullout. At times there would be other kids standing in the same area waiting

for the bus. He may have seen appellant touching the girl's lower back when he was hugging her.

Although he was not happy to be missing work to testify, Cruz was not changing his story about what he remembered just because he was unhappy to be there. What he remembered was seeing appellant and the girl at the bus stop hugging and him giving her a kiss like Cruz would kiss his own child. Most mornings when he left for work, he would also see his fiancée's mother outside of his apartment smoking a cigarette.

Teresa P., whose daughter, son-in-law (witness Cruz M.), and grandchildren lived in the same apartment complex as Jane in 2017, testified that Monday through Friday, she would drive to the apartment complex between 6:15 and 6:30 a.m. to help get her grandchildren dressed. She would then transport them to school. Before taking them to school, she would always go outside and take a smoking break near the street.

One morning in August 2017, when she was standing outside smoking a cigarette, Teresa saw a man and a child standing to the left of the office and noticed the man had a hand up the girl's shirt. He was behind the girl; their bodies were touching and they were both facing the street. His right hand was underneath her shirt, "kind of rubbing her breast." She did not think anything of it until she saw a couple walk by and the man "jumped back really fast. About two feet." It also looked like the man was kissing or nuzzling the girl's neck. At the time she saw this, Teresa was about 37.5 feet away (as measured in the courtroom) from the man and the girl. At trial, Teresa identified appellant as the man she saw with the girl.

The morning after Teresa first noticed appellant and the girl, she saw them again in the same spot. He was facing her and “had grabbed her face, and was kissing her, looked like a French kiss. He had opened his mouth before he grabbed her face. He then proceeded to put his hands on her waist, and pull her back and forth in a rocking motion.” Appellant was taller than the girl and had to lean over to kiss her. The kiss lasted 30 to 45 seconds. He then “moved her hair back and continued onto her neck.” Although appellant’s back was to her through all of this, Teresa could see the side of his face because she was standing at an angle to him. He then moved behind the girl and moved her hair again, and did the same thing to her neck. He had her wrapped in his arms, with his arms folded. When someone walked by them, appellant jumped back again.

Teresa saw appellant and the girl outside near the office every school day, Monday through Friday. On another occasion, she saw appellant with his hand in the girl’s waistband while standing at the same location where she always saw them, in front of the office. They were facing the street and he was standing behind her. She saw his hand “go into her waistband,” but was not close enough to see what he was doing. The girl “seemed very, very comfortable with what was happening.” This was when Teresa got really upset and knew something was wrong.

Teresa then told her daughter what she had seen and asked her to report it. Teresa waited until after the third occasion because she wanted to make sure “I was seeing what I was really seeing.” Also, that was a day her daughter and son-in-law happened to be at home, since she did not then know who the man and girl were. Her daughter

gave the information to law enforcement and the police then called Teresa.

After that, Teresa saw “more of the same thing every day” for about two or three weeks, until appellant was arrested. Specifically, she saw appellant’s hand in the front of the girl’s waistband once; she saw his hand go up her shirt and rub her breast three or four times; and she saw appellant kissing the girl with an open mouth more than four or five times, sometimes for a shorter period than the first time she saw him kiss her. Teresa did not recall if she saw appellant touching the girl anywhere else on her body. After refreshing her recollection by reading a detective’s report, Teresa testified that she also saw appellant touching the girl’s buttocks while they were facing each other. She saw him grab her butt three or four times when he would “bring her back and forth.”

Teresa knew a woman named Tiffany (presumably witness Tiffany R.) who lived in the apartment complex. She had met Tiffany through her daughter and had talked to her a few times.

On cross-examination, Teresa acknowledged that in August and September 2017, when she observed appellant and the girl at the bus stop, she was not familiar with any disabilities the girl might have had. The first two times Teresa saw them, she was not sure that what she was seeing was negative, and thought she may have been misinterpreting the situation. Four or five of the times she saw appellant and the girl waiting for the bus, there were other people walking around the apartment complex. Teresa also would have been visible to appellant and the girl from where they were standing as she

walked to the area where she smoked her cigarette and while she was standing there.

Teresa, who was hard of hearing, did not hear the girl make any animal noises. She needed to wear glasses whenever she drove so that she could see things that were further away, like the signs on the freeway, to know which exit was coming up. She did not go to her car and get her glasses while she was observing appellant and the girl at the bus stop because she “could see.” When she first spoke with a detective after observing appellant and the girl for approximately a month and a half, Teresa told the detective that she thought there were actually two different men standing with the girl at the bus stop because she saw a man with shorter hair one day and a man with longer hair another day. Most of the days Teresa saw appellant and the girl, he was not doing anything inappropriate, though he was still holding her in some way, sometimes holding her hand or “sometimes just hugging her like a normal person, just like had his arms wrapped around her.”

A police officer had shown Teresa six photographs and asked if the man she had seen with the girl was in one of them. She picked out one of the photos, but was not positive that it was the person she had seen. Teresa acknowledged that she had been a victim of sexual molestation as a teenager and young adult. One of the molestations was by a family member.

Santa Rosa Police Detective Marylou Armer, who participated in the criminal investigation in this case, interviewed Cruz by phone on September 29 2017. He described observing a man with a girl outside his apartment complex, and said the man was “‘squeezing where her

butt's at.' ” He also said he saw the man hugging the girl from behind and he would put his arms around her where her breasts were. He said he observed this seven to eight times.

On cross-examination, Armer testified that when she talked to Cruz on the phone, he described the kisses he observed between the man and the girl at the bus stop “as a pecking motion,” and said it was how he would kiss his own child. When she interviewed Tiffany in person on September 29, 2017, Tiffany referred to the kissing she observed between the man and girl at the bus stop as “pecking.”

Armer also met with Teresa in person on October 2, 2017. She provided Teresa with a six-pack photo lineup, which included a photo of appellant. Teresa selected someone in the lineup who was not appellant, writing, “ ‘I think that is him’ ” on the paperwork.

Also on October 2, 2017, Armer met with Jane and her mother for the first time. While she was speaking with Jane’s mother, Armer witnessed Jane kissing her mother on the face and also saw them hugging each other. She also saw Jane walk over to one of Armer’s coworkers and start to play with that individual.

Armer arrested appellant on October 2.

Defense Case

Dr. Bryna Siegel, executive director of the Autism Center of Northern California and a retired professor of child and adolescent psychiatry/director of the Autism Clinic at University of California, San Francisco for 24 years, testified as an expert in the area of autism, the education of children with autism, working with families of children with autism, and people with autism and intellectual disabilities. After reviewing Jane’s psychoeducational testing records, Dr. Siegel

concluded Jane's intellectual level was that of a two-and-a-half-year-old child. A severely autistic child like Jane cannot be expected to act like other children her age because "you would not expect a two year old to interact with people the way a normal eleven year old interacts with people. The mental capacity simply is not developed." For example, during a parent interview, an older autistic child who is at a two-and-a-half-year-old level might cuddle up in his or her mother's lap just like a much younger child would do.

Many individuals with autism do not like to be touched by other people. Some, however, like to be squeezed and held. This "often is very impersonal" in the sense that squeezing them on the shoulders might calm them down, but "it is as if a squeeze machine was squeezing them. It is not personal." Children with autism are often hypersensitive, clothing-wise, and they will try to remove uncomfortable clothing. Autistic children often repeat words they have heard (echolalia) and act out actions they have seen, for example, in a movie (echopraxia). In addition, it is "real common" for autistic children to start acting out sexually when they reach puberty, including masturbating in public. With girls, that can happen shortly after they begin to menstruate.

Dr. Siegel testified that some parents are much better than others at learning how to deal with their autistic child. For example, some parents continue to infantilize their children and let them do whatever they want to do to avoid a tantrum. When parents Dr. Siegel works with let an older child, for example, climb into their lap at a restaurant, Dr. Siegel tries to talk to them about other things they can do, explaining to them that having the child climb into your lap "just

does not look right’ ” and that “ ‘[o]ther people feel uncomfortable around a thirteen year old who is climbing into their parents’ lap.’ ” She might then talk to the parents about “alternative behaviors that look a little better.”

Individuals with severe autism and intellectual disability have difficulty comprehending the dangers of, for example, running into the street, and will not respond to cues others would respond to. Parents with autistic children with a history of running away should try to avoid situations, such as standing around in front of traffic for a long period of time, where the child will not know how to behave. But if a parent is in such a situation, “you have to keep hold of the child to so [*sic*] make sure they do not run into traffic, and you want to do it in a way that is as socially appropriate as possible.” Thus, a parent might hold the child by the wrist.

Some autistic children have a strong resistance to any change in routines. A parent leaving the home could cause a change in a child’s behavior “if there were certain things that this parent routinely did with the child that . . . [were] part of their map for navigating their day”

Dr. Siegel testified that it would not be unusual to see a caregiver holding an 11-year-old autistic child with an inability to assess danger, to prevent the child from wandering away. Nor would it be unusual for a caregiver to be moving an 11-year-old autistic child to give them some sort of stimulation to keep them distracted. Finally, it would not be uncommon for a caregiver to assist an 11-year-old autistic child who has difficulty dressing herself or hypersensitivity to clothing with adjusting his or her clothing.

On cross-examination, Dr. Siegel testified that types of touching that would soothe a child with autism could include squeezing or pushing down on their shoulders, jiggling them back and forth, and hugging. Kissing an autistic child with an open mouth would not be considered soothing behavior.

It is estimated that children with severe intellectual disability and autism are sexually assaulted at approximately 10 times the general population.

Christina Jacinto, a friend of Jane's mother, testified that she was a caretaker for Jane about four times a month, starting in 2016. Jane was a very loveable girl who would come to Jacinto and sit on her lap or put her arm around Jacinto to be held for a minute, before getting up and going back about her business. Jacinto believed that people who did not know Jane and who saw the level of affection she engaged in "would probably be shocked, because they do not understand her special needs."

Jacinto met appellant in 2016, and, from the time she met him until the fall of 2017, the interactions she observed between him and Jane were "how a father and daughter would be," such as hugging her goodbye when he dropped her off at Jacinto's home. During the time she was a caregiver for Jane in the fall of 2017, Jacinto did not notice any changes in Jane's behavior. "She is just a very loving girl that just loves the affection and attention from others."

Linda Murphy, whose foster sister was the biological sister of Jane's mother, testified that she had provided care for Jane two to three times a week for two years, from 2015 to 2017, through her work for In Home Support Services. Murphy described Jane as a very happy

child who had issues that required the adult to always be on guard to make sure she was safe by, for example, keeping her from running out into the middle of the street. Jane would also self-harm when told “no” by biting, kicking or screaming, and hitting her head. Although Jane looked her age, her behavior was more like that of a five- or six-year-old, at the most. When Murphy would come into the room, Jane would give her a full body hug and then would give her lots of little kisses. At first, Jane would kiss Murphy on the lips, but then Murphy started turning her head and Jane would give her kisses on the cheek while they hugged.

Jane had sensory issues with the texture of clothing, which caused her at times to try to remove her clothes, whether at home or in public. Throughout the time Murphy knew her, Jane would repeatedly try to pull her shirt up or her pants down, and Murphy would have to tell her multiple times, no matter where they were, to pull her shirt down or her pants up.

When Murphy took Jane out in public, she had initially tried to prevent Jane from running away by holding her hand, but found that Jane could still break loose and run. She then started putting her arms around Jane. For example, if they were standing in line at a store, Murphy would stand behind Jane and wrap her arms around her, with Jane leaning into Murphy’s body. It was “like a hug, and then she put her head on my shoulder, and we would rock back and forth, and that was the way she felt comfortable,” with enough “stimulus,” to wait without getting too impatient or overly triggered.

Murphy testified that Jane had issues with accessing pornography on the computer since at least 2015. While Murphy would

be in the kitchen making lunch and Jane would be on the computer, Murphy would turn around and see that Jane was watching, for example, a pornographic cartoon. When Murphy shut down the computer, Jane would cry and start self-harming. They began putting parental blocks on the computer, but Jane would find other sites. This was an ongoing issue, and continued into 2017.

Murphy met appellant when he and Jane's mother started dating, sometime in 2017. She had the opportunity to observe appellant and Jane together many times, and had no concerns about their interactions; "it was just a daughter who loved her dad."

DISCUSSION

Appellant's sole contention on appeal is that substantial evidence did not support the court's finding that he committed a lewd act upon the body of Jane, in violation of section 288, subdivision (a),³ and thereby violated the condition of his parole that he obey all laws.

I. Trial Court Background

In its written order revoking appellant's parole, the court focused primarily on the trial testimony Cruz, Tiffany, and Teresa, noting that they were "independent people who did not know [appellant] or Jane other than to see them occasionally in the apartment complex." The court described Cruz as "a reluctant witness at trial" who denied seeing inappropriate interactions between appellant and Jane, but who was impeached with his prior statements to Detective Armer that he saw

³ Section 288, subdivision (a) provides in relevant part: "[A] person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony"

appellant kiss Jane's forehead, grab her "butt," and wrap his arms around her such that his hands were around or on her breasts.

The court further found that Cruz's statements corroborated the testimony of Tiffany and Teresa. The court found that Tiffany was a credible witness who testified that she saw appellant kiss Jane on the mouth three times "in an intimate and sexual manner that she considered to be inappropriate for a parent or person to do to any age child." Finally, the court recounted Teresa's testimony that appellant "leaned over" to " 'French kiss' " Jane, "grabbing her face and pulling her into him for 30-45 seconds, then moving his kisses down her neck." The court also cited Teresa's testimony that she had observed appellant's hand up Jane's shirt and believed he was rubbing her breast. She also observed that when a person walked into appellant's view, "he quickly jumped back from [Jane], which is exactly what [Tiffany] observed and testified to seeing." The court found that Teresa's testimony "corroborates [Tiffany's] and [Cruz's] testimony" and that, "[o]verall, [Teresa's] testimony was credible on the issues that she observed, though may have been exaggerated in parts."

The court found that these witnesses' testimony showed that "[t]he touchings of [Jane's] body by [appellant] were willful on [appellant's] part because they were initiated by him." The court thus found that his conduct satisfied the first element of section 288, subdivision (a): "The defendant willfully touched any part of a child's body either on the bare skin or through the clothing." (Citing CALCRIM No. 1110.) The court dismissed the defense theory that this was the way the family interacted, with "hugging, kissing, and boundary issues between" Jane and appellant, stating, "[t]he fact that

this is ‘how they interact’ is not a justification or excuse for the conduct.”

As to the second element of section 288, subdivision (a), which requires that “[t]he defendant committed the act or acts with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [himself] or the child” (CALCRIM No. 1110), the court found “the touchings were for the sexual gratification of the child.” In support of this finding, the court described evidence that Jane had been “a sexualized child” since age 10, who was aware of sexual things like pornography and who “liked to kiss people on the lips for too long [which] was an issue they were working on.” The court further stated that appellant’s behavior with Jane, who had begun menstruating in 2016, “as described by the witnesses is sexual in nature. In his position in loco parentis, [appellant] was aware of these issues of kissing, interest in sex, and inappropriate boundaries.”

In particular, the court noted that Jane’s behavior in her new middle school class changed from well-behaved to acting out in class for three weeks in October 2017, during which she masturbated on a sensory ball while yelling the words, “fuck” and “sexy.”

The court found from “this evidence of changed behavior . . . that inappropriate behavior was occurring in the life of [Jane]. The sexual behavior toward Jane by [appellant] is a potential cause, as is the fact that [appellant] was arrested and Jane removed from the home and placed in foster care.”

The court concluded, as to the second element in subdivision (a) of section 288, that Jane, “a young child, age 11 when the alleged acts occurred, . . . is clearly interested in sex and sexual activity, which is

unusual for a child of this age. [Appellant] was aware of [Jane's] interest in pornography, sexuality, and her interest in kissing and hugging. There is no evidence to suggest that [appellant] was sexually gratified by the acts he perpetrated, but the fact that he initiated this intimate and sexual conduct with Jane as described by the witnesses, the court finds [*sic*] the element two is met, that this conduct was done for purposes of gratifying the lust and passions of Jane to the preponderance of the evidence standard. This conduct also can be inferred to have gratified [appellant].”

The court also found that the evidence showed that Jane was 11 years old at the time of the touching, which satisfied the third element of section 288, subdivision (a), that “[t]he child was under the age of 14 years at the time of the act.” (Citing CALCRIM No. 1110.)

Based on this analysis, the court concluded that because it was “more likely than not” that appellant’s acts, which were sexual in nature, “were perpetrated for purposes of gratifying the lust and passions of Jane to the requisite standard of preponderance of the evidence,” appellant was in violation of his parole.⁴

II. *Legal Analysis*

“Notwithstanding any other law, if Section 3000.1^[5] . . . applies to a person who is on parole and the court determines that the person has

⁴ When the court verbally announced its finding that appellant was in violation of his parole, it had stated, “I agonized over this. [¶] I realize the ramifications for you, [appellant], are that you will be sent back to CDC based upon this order and that you will—they will evaluate you and decide what that will mean for you and I have agonized over this so”

⁵ Section 3000.1, subdivision (a)(1) provides: “In the case of any inmate sentenced under Section 1168 for any offense of first or second

committed a violation of law or violated his or her conditions of parole, the person on parole shall be remanded to the custody of the Department of Corrections and Rehabilitation and the jurisdiction of the Board of Parole Hearings for the purpose of future parole consideration.” (§ 3000.08, subd. (h).)

Parole revocation determinations must be based on a preponderance of the evidence admitted at the parole revocation hearing. (§ 3044, subd. (a)(5);⁶ *People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)⁷ “Because ‘the [parolee] faces lengthy incarceration if his [parole] is revoked’ [citation], and termination of his or her liberty ‘inflicts a “grievous loss” on the [parolee] and often on others’ [citation], the [parolee] has ‘a continued post-conviction interest in accurate fact-finding and the informed use of discretion by the trial court . . . “to insure that his liberty is not unjustifiably taken away” ’ [Citations.]” (*People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1294, quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 482 & *People v. Winson* (1981) 29 Cal.3d 711, 715.)

degree murder with a maximum term of life imprisonment, the period of parole, if parole is granted, shall be the remainder of the inmate’s life.”

⁶ CALCRIM No. 2.50.2 defines “preponderance of the evidence” as “evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.” (See also *People v. Rogers* (2013) 57 Cal.4th 296, 337 [quoting CALCRIM No. 2.50.2].)

⁷ Although *Rodriguez* involved a probation revocation hearing, “[p]arole and probation revocation hearings are equivalent in terms of the requirements of due process. [Citations.]” (*People v. Rodriguez, supra*, 51 Cal.3d at p. 441.)

We review an order revoking parole for abuse of discretion and review the trial court’s factual findings for substantial evidence. (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318 (*Butcher*).) “Evidence, to be ‘substantial’ must be ‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*).) As our Supreme Court explained in *Johnson*, we do not “limit [our] review to the evidence favorable to the respondent. [Citation.] [Instead,] ‘our task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the [trier of fact]—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to “some” evidence supporting the finding, for “[n]ot every surface conflict of evidence remains substantial in the light of other facts.” ’ [Citation.]” (*Id.* at p. 577; accord, *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1262.)

Section 288, subdivision (a) “is violated if there is ‘ “any touching” of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child.’ [Citation.] Thus, the offense described by section 288[, subdivision] (a) has two elements: ‘ “(a) the touching of an underage child’s body (b) with a sexual intent.” [Citation.]’ [Citation.]” (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890 (*Villagran*).)

In the present case, we conclude substantial evidence supports the trial court’s factual findings that appellant willfully touched Jane’s body and that Jane was under the age of 14 at the time of the

touchings. (See § 288, subd. (a); *Villagran*, *supra*, 5 Cal.App.5th at p. 890.) However, as we shall explain, considering “the *whole* record,” we conclude the court’s finding that appellant touched Jane with the intent to gratify her “lust and passions,” as the court put it, was *not* supported by substantial evidence. (*Johnson*, *supra*, 26 Cal.3d at p. 577; see § 288, subd. (a); *Villagran*, at p. 890.)

In concluding that appellant touched Jane with the intent to sexually gratify her, the court cited witness testimony showing that he “initiated this intimate and sexual conduct” with the knowledge that Jane had issues related to kissing, an interest in sex, and inappropriate boundaries, and found that this evidence demonstrated, by a preponderance of the evidence, that the touching was for a sexual purpose. In reaching this conclusion, however, the court incorrectly focused on a small fraction of the evidence and failed to analyze that evidence in light of the entire record, in all of its complexity. (See *Johnson*, *supra*, 26 Cal.3d at p. 577.)

As noted, the court focused in particular on the testimony of the three witnesses who had observed the physical contact between appellant and Jane. The court seemed to find the fact that these three witnesses—Cruz, Tiffany, and Teresa—were “strangers,” i.e., “independent people” who did not know appellant and Jane, added to the strength of their testimony. On the contrary, the fact that none of these witnesses appeared to be aware of Jane’s severe autism, intellectual disabilities, and behavioral idiosyncrasies could not help but distort their perceptions, cause them to make certain assumptions, and influence their conclusions that the contact they saw between appellant and Jane must have been sexual.

In addition, the witnesses' uncertainty about the nature of what they had seen is reflected in their failure to initially report the touchings. The first two times Teresa saw appellant and Jane, she was not sure that what she was seeing was negative, and thought she may have been misinterpreting the situation. Tiffany similarly testified that after first seeing appellant and Jane, she wanted to observe them again and make sure she was not wrong about what she had seen. These uncertainties are also reflected in conflicting descriptions offered by Cruz and Tiffany in their statements and at trial. Although at trial he denied making such statements, according to Detective Armer, Cruz had said that appellant was "squeezing where her butt's at," and that his "arms were around the chest area and squeezing." At trial, Cruz testified that he saw appellant's hands only on the girl's stomach, and also testified that in his interview with Armer, she "kept on asking me over and over again about where his hands were." Tiffany, who at trial described the kisses as "passionate," had previously described them to Armer as "pecking," as had Cruz, who told Armer the kisses were "a pecking motion," like how he would kiss his own child.

Moreover, numerous issues underlay Teresa's testimony. When she witnessed the touchings between appellant and Jane, she was almost 40 feet away from them; she was nearsighted and not wearing her glasses; appellant's back was to her while he was kissing Jane, though she claimed he was also at an angle, which allowed her to see the details of the kissing; she told police that she had seen two different men touching Jane at the bus stop; and she picked the wrong person out of a photo lineup that included a photograph of appellant. Despite all of this, Teresa insisted at trial that she was able to see appellant,

among other things, grab Jane, pull her into him, and French kiss her for 30 to 45 seconds. It is notable that this testimony about the kissing is in great contrast to the statements of both Cruz and Tiffany, who both described the kisses as “peck[s].” Even the court noted that Teresa’s testimony “may have been exaggerated in parts,” although it nevertheless found her testimony credible regarding what she had observed.

In addition, although these three witnesses may have been strangers to appellant and Jane, they were not strangers to each other. Cruz was Teresa’s son in law and Teresa testified that she had spoken several times to a neighbor in the apartment complex named “Tiffany.” Cruz testified that “everybody in the complex was talking about” the man and the girl at the bus stop. The conversations these witnesses had, whether with each other or other people, would inevitably have reinforced the notion that something sexually inappropriate was taking place.

Finally, the fact that both Tiffany and Teresa had personal or close family experiences with sexual abuse or assault could, understandably, further affect the lens through which they viewed the unusual interactions they saw between appellant and Jane, an 11-year-old pubescent girl.

In addition to these three eyewitnesses, the court found significant the testimony of Jane’s teacher, Malvesti, that Jane “was well-behaved in class and kept to herself,” did not have issues with personal space, and did not hug or kiss people in class, but began to act out sexually for a period of three weeks in October 2017, which the court believed was “potential[ly]” caused by appellant’s sexual behavior.

However, that Jane, like most children, would behave differently at school, especially near the start of the school year when she was in a new class at a new school with mostly new classmates and a new teacher, compared to her behavior at home, should not be surprising. As Dr. Siegel testified, she never visited classrooms to do teacher training during the first month of the school year because, at that early time, the children are getting to know the teacher, how to communicate with that teacher, and what they can or cannot get away with. Moreover, a child's early behavior might be especially different initially in a new classroom in a new school. Also, that Jane would act out at school in October 2017, after appellant's arrest and around the time of her removal from her mother and her home, is anything but surprising.

Moreover, while Jane acted out at school during that three-week period after appellant's arrest, her interest in sex, her viewing of pornography, and her echolalia long preceded appellant's entry into her home. The court itself referred to this fact, citing the testimony of Jane's mother primarily to note that Jane "is a sexualized child," was interested in pornography, and "liked to kiss people on the lips for too long," an issue "they were working on." The court also cited Murphy's testimony to make the same point, that Jane was "aware[] of sexual things such as pornography." In finding that appellant acted for Jane's sexual gratification, the court specifically found that 11-year-old Jane's interest in sex was "unusual for a child of this age." This finding was completely contrary to the evidence presented at trial, particularly the testimony of Dr. Siegel that it is quite common for autistic children to act out sexually once they reach puberty, including masturbating in public.

Importantly, in evaluating the testimony of these witnesses, the court seemingly ignored the extensive evidence regarding Jane and her family's specific situation, which is what makes this case so unusual. That other evidence included the detailed testimony of Dr. Siegel, a retired professor of child and adolescent psychiatry and an expert on autism, to which the court did not refer at all. Dr. Siegel had concluded that Jane had the intellectual level of a two-and-a-half-year-old child. As such, she could not be expected to act like other children her age because "you would not expect a two year old to interact with people the way a normal eleven year old interacts with people." Dr. Siegel also testified that some autistic children like to be squeezed and held, which "often is very impersonal" in the sense that squeezing them on the shoulders might calm them down, but "it is as if a squeeze machine was squeezing them. It is not personal." In addition, autistic children are often hypersensitive to clothing, and try to remove uncomfortable clothes.

Dr. Siegel further testified that some parents of autistic children are much better than others at learning how to deal with their child, and that many parents continue to infantilize their children and let them do whatever they want to do to avoid a tantrum. For example, when working with parents who allow an older child to climb into their lap at a restaurant, Dr. Siegel would look for alternatives, explaining that having the child climb into a parent's lap " 'just does not look right' " and that " '[o]ther people feel uncomfortable around a thirteen year old who is climbing into their parents' lap.' "

Other crucial evidence ignored by the court included Dr. Siegel's testimony that parents of autistic children with a history of running

away should try to avoid situations where the child will not know how to behave, such as standing for a long time near traffic. But if this is not possible, the parent must “keep hold of the child to . . . make sure they do not run into traffic,” noting that some types of touching that might soothe a child with autism included squeezing or pushing down on their shoulders, jiggling them back and forth, and hugging. Fuller, Jane’s occupational therapist, also testified that one of the things she was working on with Jane and her family was Jane’s habit of running away and not following directions to come back. Murphy, one of Jane’s caregivers, testified that when she took Jane out in public, she could not prevent Jane from running away by merely holding her hand, so she would put her arms around Jane, for example while they were standing in line at a store. Murphy would stand behind Jane and wrap her arms around her, with Jane leaning into her body, and they “would rock back and forth, and that was the way [Jane] felt comfortable enough” to wait without getting too impatient or overly triggered. Murphy said she “got some strange looks” when holding Jane this way in public. She believed no one made comments, however, because she was a woman and had her own daughter with her as well, which she thought “felt safer” for other people.⁸

This evidence plainly was key to understanding the testimony of the eyewitnesses, including Tiffany, who described appellant’s behavior

⁸ The testimony of Tiffany and Teresa that appellant moved or changed position when other people came near him and Jane at the bus stop speaks to appellant’s likely awareness of how odd or inappropriate his interactions with Jane would appear to strangers, as well as his lack of experience and ability with other, more socially acceptable ways of keeping Jane calm and safe while waiting for the bus in an area next to a driveway, a parking lot, and a street.

with Jane at the bus stop as “pressing himself into her and rubbing her shoulders,” which to her was reminiscent of the way a boyfriend and girlfriend would hug, and Teresa, who described appellant as “pull[ing] her back and forth in a rocking motion.”

In addition, a number of witnesses, including Jane’s mother and her caregivers, Murphy and Jacinto—people who knew Jane best and regularly saw appellant in the home with Jane—testified that they did not find anything concerning about appellant and Jane’s interactions. Only her occupational therapist, Fuller, mentioned any discomfort at all, and only about seeing Jane jump into appellant’s lap on two occasions and noticing that appellant often did not wear a shirt in the home. Although she was a mandated reporter, Fuller never felt the need to report these observations to law enforcement, because she “knew Jane’s background of her being really affectionate.”

The court also focused on Jane’s “unusual” sexuality, ignoring the abundant evidence of Jane’s affectionate nature, which included—in addition to Fuller’s testimony noted above—the testimony of Jacinto, one of Jane’s caregivers, who said she believed that people who did not know Jane and who saw the level of affection she engaged in “would probably be shocked, because they do not understand her special needs.” Murphy also testified about Jane giving her full body hugs and lots of little kisses. Finally, even Detective Armer testified that while she was interviewing Jane’s mother, she observed Jane and her mother hugging each other and Jane kissing her mother on the face.

All of this extremely significant evidence presented at trial, during both the prosecution and defense cases, consistently showed that due to her severe autism and intellectual disabilities, Jane had the

intellectual level of a toddler, and that those who cared for her believed she needed to be held, rocked, and squeezed to keep her from running into traffic or having a tantrum while waiting for the school bus. This evidence also revealed both Jane's extraordinarily affectionate nature, together with a lack of boundary setting that was the norm in her family. Finally, the evidence showed that Jane, like most autistic children, began to act out sexually when she reached puberty, well before appellant became part of her family.

None of this evidence was even mentioned by the trial court in reaching its determination that appellant had touched Jane with the intent to sexually gratify her. Instead, the court relied chiefly on the observations of three people, none of whom were aware of the unique circumstances of Jane and her family, and who were therefore understandably taken aback to see a man and a pubescent girl engaging in hugging, squeezing, rubbing, rocking, kissing, and neck nuzzling while standing at a school bus stop in a very public location.

Consideration of the entire record to understand Jane, as well as appellant's interactions with her, was thus essential to an accurate assessment of the testimony of the three eyewitnesses and the inferences that could reasonably be drawn from their testimony regarding appellant's intent. The court's analysis, however, failed to take all of the evidence into account. Instead, it focused on the testimony of the eyewitnesses in nearly complete isolation, along with unsupported assumptions about Jane's sexuality and her behavior at school. Consequently, the court's inference, based on this partial evidence that appellant intended to sexually gratify Jane when he touched her, was simply not reasonable in the circumstances of this

case. (See *People v. Massie* (2006) 142 Cal.App.4th 365, 374 [if trier of fact's "conclusion is mere guesswork, . . . it cannot rise to the dignity of an inference"]; accord, *People v. Boatman*, *supra*, 221 Cal.App.4th at pp. 1265–1266.)

Although, when viewed in isolation, it is possible to point to “ ‘some’ evidence” supporting the court’s factual finding regarding appellant’s intent, we conclude that such evidence, in light of the entire record, was *not* “ ‘of ponderable legal significance’ . . . reasonable in nature, credible, and of solid value,” such that a reasonable trier of fact could have concluded, by a preponderance of the evidence, that appellant touched Jane with the intent to gratify her sexually. (*Johnson*, *supra*, 26 Cal.3d at pp. 576, 577; see also *id.* at p. 577 [“the ‘seemingly sensible’ substantial evidence rule may be distorted,” as when “ ‘an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record,’ ” since “ ‘[s]uch a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence’ ”]; see *Butcher*, *supra*, 247 Cal.App.4th at p. 318.) Rather, the entirety of the evidence demonstrates only that appellant was not adept at setting boundaries with a severely autistic and exceedingly affectionate child with whom he had been in a parental role for less than a year, and that he was unable to keep such a child safe and calm in public without strangers thinking, as Dr. Siegel put it, that it “ ‘just does not look right.’ ” Indeed, while the court may have been correct when it stated that appellant touched Jane with the intent to “placate” her, its effort to equate such an intent with the intent to sexually

gratify her was simply unsupported by the evidence. (See *Johnson*, at p. 577.)

In sum, substantial evidence did not support the trial court's determination that appellant acted with the intent "of gratifying the lust and passions of Jane Doe," in violation of section 288, subdivision (a). (See *Butcher, supra*, 247 Cal.App.4th at p. 318.) The court's order revoking appellant's parole was therefore an abuse of discretion, and must be reversed. (See *ibid.*)

DISPOSITION

The order revoking appellant's parole is reversed.

Kline, P.J.

We concur:

Richman, J.

Stewart, J.

People v. McNutt (A157472)